

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ELYSE KANE,

Plaintiff,

v.

CITY OF BAINBRIDGE ISLAND,

Defendants.

No. C10-5731 RBL

ORDER DENYING DEFENDANT'S
MOTION TO COMPEL RESPONSES TO
DISCOVERY, DEFENDANT'S MOTION
TO DETERMINE SUFFICIENCY OF
PLAINTIFF'S RESPONSES TO REQUESTS
FOR ADMISSIONS, AND DEFENDANT'S
AND PLAINTIFF'S REQUEST FOR AN
AWARD OF REASONABLE ATTORNEYS
FEES

This matter has been referred to the undersigned Magistrate Judge for all discovery matters pursuant to 28 U.S.C. §§ 636(b)(1)(A) and (B) and Local Magistrate Rules MJR 1, MJR 3 and MJR 4.

Before the Court are Defendant's Motion to Compel Responses to Discovery (ECF No. 11), Defendant's Motion to Determine Sufficiency of Plaintiff's Responses to Requests for Admission and an Award of Reasonable Attorneys' Fees (ECF No. 13), and Plaintiff's request for attorneys' fees (ECF No. 16, pages 5-6). After reviewing Defendant's motions, Plaintiff's responses, Defendant's replies, and the accompanying declarations and attachments, the

ORDER DENYING DISCOVERY MOTIONS - 1

1 Defendant's motions are DENIED for the reasons set forth below. Plaintiff's corresponding
2 request for attorneys' fees (ECF No. 16, page 5-6) is also DENIED.

3 The first sentence in the first order issued by this Court in this case was that "All
4 discovery matters should be resolved by agreement if possible." (ECF No. 5, Order Regarding
5 Discovery and Depositions.) The Court in that order also noted that the conduct of the parties in
6 pretrial matters should be guided by the provisions of the Code of Pre-Trial Conduct published
7 by the American College of Trial Lawyers. (Id.) Among other things, that Code sets forth the
8 following requirement for discovery practice:
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10 (4) When a discovery disputes arises, opposing lawyers must attempt to
11 resolve the dispute by working cooperatively together. Lawyers should
12 refrain from filing motions to compel or for court intervention unless they
13 have generally tried, but failed, to resolve the dispute through all reasonable
14 avenues of compromise and resolution.

15 Further, Fed. R. Civ. P. 37(a) provides that no party shall move for an order compelling
16 disclosure or discovery unless the moving party includes a "certification that the movant has in
17 good faith conferred or attempted to confer with the person or party failing to make disclosure or
18 discovery in an effort to obtain it without court action."

19 Finally, in an effort to expedite resolution of discovery disputes, the Court also notified
20 the parties:

21 If a ruling is needed on any discovery question, and counsel wish to
22 avoid the time and expense of a written motion, they may place a joint call to
23 chambers at (253) 882-3840, requesting a conference call with the staff
24 attorney assigned to the case to determine whether it is appropriate to obtain
25 an expedited ruling through a telephone conference call.

26 (ECF No. 5, Order Regarding Discovery and Depositions) The record does not reflect that either
party made any attempt to use this method of resolution.

1 The Court reminds the parties of the above because a review of the record persuades this
2 Court that the parties are talking past each other rather than intending to resolve these discovery
3 disputes in accordance with the order of this Court, the Code of Pre-Trial Conduct, and the
4 Federal Rules of Civil Procedure. Unless either party can demonstrate on a specific discovery
5 request that there is a legitimate dispute requiring Court intervention, no order compelling
6 discovery or awarding attorneys fees will issue.
7

8 FACTUAL AND PROCEDURAL BACKGROUND

9 In a 54-page complaint dated August 25, 2010, Plaintiff alleges what appear to be thirteen
10 (13) causes of action against the City of Bainbridge Island regarding events surrounding the
11 development and use of a residential property located at 9865 Manitou Beach Drive NE,
12 Bainbridge Island, Washington. As noted by the Defendant, the complaint includes 375
13 paragraphs of allegations and assertions. The case was removed from Kitsap County Superior
14 Court on October 5, 2010 (ECF No. 1). Although not initially filed in this court, this complaint
15 is required to comply with Fed. R. Civ. P. 8(a) which states, in part, that a claim for relief should
16 include “a short and plain statement” of the grounds for the court’s jurisdiction, “a short and
17 plain statement” that the pleader is entitled to relief, and “a short and plain statement” of the
18 relief sought. Defendant claims that discovery was necessary to clarify what it characterized as
19 “a perplexingly long complaint.” (ECF No. 11, page 3.)
20

21 In an alleged attempt to “clarify” the issues, Defendant propounded its first discovery
22 requests to Plaintiff (ECF No. 11, Exhibit B). These included twenty-one (21) pages of
23 interrogatories, requests for production and request for admissions and sixty-one (61) separate
24 inquiries (subparts not included). Before receiving answers to these requests, Defendant served
25 its Second and Third Discovery on Plaintiff (ECF No. 12, Exhibit B). Plaintiff characterized
26

1 these combined discovery requests as “thinly veiled tactics to ratchet up attorneys’ fees and busy
2 work not based on the actual merits of the case” (ECF No. 16, page 5).

3 After receiving a forty-five (45) day extension to respond to these discovery requests,
4 Plaintiff submitted “Plaintiff’s Supplemental Answers to Defendant’s First Discovery (ECF No.
5 12, Exhibit C). These “answers” included a three-page “Preliminary Statement” and “General
6 Objections.” Many of the answers simply referenced attached documents. Some answers simply
7 referred Defendant to Plaintiff’s Amended Complaint (ECF 12, Exhibit C). These responses
8 were accompanied by three boxes of documents that were delivered to Defendant’s counsel
9 (ECF No. 12, ¶5, Decl. of Rosenberg), which Plaintiff describes as 6,000 documents and
10 included some papers that were “badly distorted” because of water damage caused by a flood.
11 (ECF No. 16-2, ¶¶ 4, 6, Decl. of Kane.) These documents were repeatedly referred to in
12 Plaintiff’s responses and were apparently categorized by attachment number. See, e.g., ECF No.
13 12, pages 6-11.
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16 Plaintiff complains that only one day after delivering these responses and documents to
17 defense counsel, defense counsel was requesting a Rule 26 conference without thoroughly
18 reviewing the documents. (ECF No. 16, page 3.) Plaintiff claims that defense counsel has only
19 performed a “cursory glance” at the responses. Id.

20 Defendant complains that Plaintiffs “have ignored their duty to respond to discovery” and
21 provided “evasive and incomplete responses.” (ECF No. 11, page 5).
22

23 The Court notes that Plaintiff’s discovery responses were delivered to defense counsel at
24 4:27 p.m. on April 14, 2011 (ECF No. 12, Ex. C, page 92, 109) and that Defendant asked for and
25 conducted a “discovery conference” the following morning, Friday, April 15, 2011, which
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1 side has made a reasonable attempt to resolve these issues without court intervention. Therefore,
2 none of the relief requested by either side is justified at this time. The Court reserves the right to
3 award attorneys' fees and costs in the event the parties are unable to resolve these disputes and
4 require further court intervention.

5 I. Defendant's Motion to Compel Responses to Discovery

6 Defendant is requesting that this Court order Plaintiff to do what Plaintiff is already
7 obligated to do – namely, provide full, accurate, non-evasive responses to all interrogatories and
8 requests for production. This is not the purpose of a motion to compel under Fed. R. Civ. P. 37.
9 Such a motion should only be made by specifying a particular interrogatory or interrogatories
10 submitted under Fed. R. Civ. P. 33 or by identifying a particular response to a request for
11 production under Fed. R. Civ. P. 34 that fails to meet the discovery requirements. See
12 37(a)(3)(B)(iii)-(iv). Defendant has done neither. Instead, Defendant has simply submitted a
13 five-page motion including a general citation to Fed. R. Civ. P. 26(b)(1) and Fed. R. Civ. P.
14 37(a)(2)(B).
15

16 Defendant received Plaintiff's response late in the afternoon on Thursday, and then
17 immediately arranged for a discovery conference first thing Friday morning. The record reflects
18 that Defendant did not spend even a single business day reviewing the 6,000 pages of documents
19 before declaring that the responses were inadequate in every respect. The requirements of "meet
20 and confer" should not be considered a checkmark as a prelude to a motion. While neither side
21 has attempted to characterize their twenty-minute "conference," this court is not satisfied that a
22 meaningful discussion took place.
23

24 In order to promote future meaningful discovery conferences between the parties, the
25 court offers several points for the parties to consider.
26

1 First, a party has the option of producing business records in response to interrogatories.
 2 Fed. R. Civ. P. 33(d) provides in part:

3 **Option to Produce Business Records.** If the answer to an
 4 interrogatory may be determined by examining, auditing,
 5 compiling, expecting, or summarizing a party's business records .
 6 . . . and if the burden of deriving or ascertaining the answer will be
 7 substantially the same for either party, the responding party may
 8 answer by:

9 . . .
 10 (2) giving the interrogating party a reasonable opportunity
 11 to examine and audit the record and to make copies,
 12 compilations, abstracts, or summaries.

13 Second, simply referring to the complaint is an insufficient answer. Each party has an
 14 obligation to do a thorough review of the facts and documents reasonably within their control for
 15 the purpose of providing responses to discovery. Failing to exercise due diligence in providing
 16 full and complete responses to interrogatories is not acceptable.

17 Third, while "contention interrogatories" are sometimes cumbersome, they can be
 18 necessary when Plaintiff fails to set forth a "short and plain statement" of the claim for relief. In
 19 the end, each side will reap what is sown. The seeds of this discovery dispute appear to have
 20 been planted with Plaintiff's unwieldy complaint.

21 Until this court is presented with a particular issue on a particular response that the
 22 parties have reasonably attempted to resolve through a meaningful discovery conference, no
 23 order compelling discovery will be issued.

24 II. Defendant's Motion to Determine Sufficiency of Plaintiff's Responses to 25 Requests for Admission.

26 Unlike Defendant's Motion to Compel Discovery, Defendant has asked that specific
 requests for admission be deemed admitted. Although this Court has the authority to deem
 matters admitted if they do not "comply with the requirements of this Rule" Fed. R. Civ. P.

1 36(a)(6), it appears that Plaintiff's responses do comply with the requirements of the Rule.
2 Therefore, such a sanction is not appropriate at this time.

3 This Court recognizes that Fed. R. Civ. P. 36 allows litigants to request admissions as to a
4 broad range of matters, including ultimate facts. See, e.g., 999 Corp. v. CIT Corp., 777 F.2d 866,
5 868-69 (9th Cir. 1985); Tillamook Country Smoker, Inc. v. Tillamook County Creamery Ass'n,
6 333 F. Supp.2d 975, 984 (D. Or. 2004). The purpose of the rule is to expedite resolution of
7 uncontroverted matters and to avoid the expense of preparing and proving matters that are not in
8 dispute. Asea v. Southern Pacific Transportation Co., 669 F.2d 1242, 1245 (9th Cir. 1981). Fed.
9 R. Civ. P. 36(a)(4) provides that if a matter is not admitted, the answer must "specifically deny it
10 or state in detail why the answering party cannot truthfully admit or deny it." While a party may
11 assert lack of knowledge or information as a reason for failing to admit or deny, this can only be
12 done after "reasonable inquiry." Id. If a responding party fails to admit or denial, and fails to
13 provide a reasonable explanation for doing so, then the answer is insufficient, and the requesting
14 party may move the court for an order either that the matter is admitted or that an amended
15 answer be served. Fed. R. Civ. P. 36(a)(6).

16 Here, all of the requests for admissions submitted to this court by Defendant were denied
17 by the Plaintiff. Plaintiff raised no objections. Plaintiff did not obfuscate nor claim that she
18 lacked of knowledge or information as a reason for failing to admit or deny. Plaintiff simply
19 denied them. This answer, at this stage of the litigation is sufficient. This means that Defendant,
20 if required, will need to prove each of these facts at trial.

21 Fed. R. Civ. P. 37(c)(2) provides in part:
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1 ***Failure to Admit.*** If a party fails to admit what is requested
2 under Rule 36 and if the requesting party later proves a document
3 to be genuine or a matter true, the requesting party may move
4 that the party who failed to admit pay the reasonable expenses,
5 including attorney's fees, incurred in making that proof. The
6 court must so order unless:

7 (A) The request was held objectionable under
8 Rule 36(a);

9 (B) The admission sought was of no substantial
10 importance;

11 (C) The party failing to admit had a reasonable
12 ground to believe it might prevail on the matter; or

13 (D) There was other good reason for the failure to
14 admit.

15 Defendant apparently believes that it has evidence to prove each of the matters. Plaintiff
16 has asserted, and apparently believes, that the matters are in dispute. Therefore, if necessary,
17 Defendant will be required to prove these facts at trial and if the Court believes that these matters
18 should have been admitted, then the Rules contemplate that the offending party can be required
19 to pay reasonable expenses, including attorney fees in making the proof. Now is not the time for
20 such an award.

21 III. Request for Attorney Fees

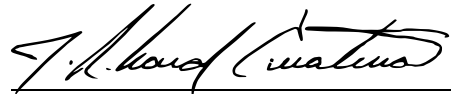
22 Both parties have asked for an award of attorney fees. Both requests are DENIED. For
23 the reasons stated above, the Court is not persuaded that either side has done everything possible
24 to resolve these discovery disputes without court intervention.

25 IV. Amendment of Minute Order Regarding Discovery and Depositions.

26 As noted earlier, the court has previously issued a Minute Order regarding Discovery and
Depositions (ECF No. 5). The parties are encouraged to carefully review that Order again. As
this matter has now been referred to the undersigned for purposes of resolving discovery issues,
it should be noted by both parties that should either side request a joint call to chambers for an

1 expedited ruling by telephone conference, then this request should be made to the undersigned,
2 rather than the District Judge. Chambers phone number is (253) 882-3780.

3 DATED this 13th day of May, 2011.

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6 J. Richard Creatura
7 United States Magistrate Judge
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